APPENDIX — AWARD OF ARBITRATOR DATED JULY 11, 2000

FMCS #99-0929; GR. #125-98-35

GRIEVANT: STEVE MIDDLETON

GRIEVANCE: COMPANY REFUSAL TO RETURN TO WORK

DATE OF INJURY: MAY 30, 1996

DATE OF GRIEVANCE: 10-16-98

IN THE MATTER OF ARBITRATION BETWEEN

BALL-FOSTER GLASS CONTAINER CO., L.L.C.

AND

GLASS, MOLDERS, POTTERY, PLASTICS AND ALLIED WORKERS INTERNATIONAL UNION, LOCAL 125

HEARING HELD ON APRIL 10 AND 11, 2000, AT HOLIDAY INN, DE SOTO, TEXAS, WITH RICHARD M. KOBDISH AND DAVID R. DEITCHMAN, ATTORNEYS AT LAW, REPRESENTING THE COMPANY; ADRIENNE A. BERRY, ATTORNEY AT LAW, REPRESENTING THE UNION AND THE GRIEVANT; BEFORE BARNETT M. GOODSTEIN, ARBITRATOR SELECTED THROUGH THE PROCEDURES OF THE FMCS, WASHINGTON, D.C.

Appendix

ISSUE

DID THE COMPANY VIOLATE THE COLLECTIVE BARGAINING AGREEMENT BY REFUSING TO RETURN THE GRIEVANT, STEVE MIDDLETON, TO EMPLOYMENT, AS AND WHEN IT DID, FOLLOWING HIS INJURY AT WORK ON MAY 30, 1996? IF SO, WHAT SHALL BE THE APPROPRIATE REMEDY THEREFOR?

BACKGROUND

For the past 35 years, the Company has manufactured glass bottles for the beer industry, at its Waxahachie, Texas Plant. Until recently, the parties operated under separate Collective Bargaining Agreements for the Production and Maintenance employees (who work at [sic] what is called the Cold End) and for the Automatic Machine Department (for employees who work in what is called the Hot End). For the 3-year Agreement, effective April 1, 1999, the parties negotiated a single Contract for both P & M Workers and for the Automatic Machine Department.

At the present time, there are approximately 140 employees at the facility, approximately 120 of whom are in the bargaining unit. This same Union has represented the bargaining unit employees during its entire period at this location. The Company has other locations, all over the country, all under the same Collective Bargaining Agreement.

The Grievant began working for the Company on December 5, 1988. He suffered an on-the-job back injury during 1994, but returned to work after treatment. On May

30, 1996, while doing his regular work assignments, as a Floorperson, the Grievant testified he heard his neck or back pop; he felt his neck and back tingle, and the impulses ran down his legs. He continued working, completed his shift, and then continued working at his regular classification until his injury became too aggravated. Subsequently, he left work on a medical leave.

He was released to return to work on June 28, 1996, by Eddie Joslin, M.D., with no restrictions. However, on August 30, 1996, he had to leave work again, due to his back injury. On August 30, 1996, the Grievant filed another Report of Injury with the Company, describing his May 30 injury. In this Report, he stated that, "[M]y back popped just like before. This has been something thats (sic) haunted me for 2 yrs." He wrote that he had reported both back strains to Tom Sharp, Jr., a Management Representative. At that time, the pain in his back became so intense that he went to the Emergency Room at the local hospital. At the hospital, the Grievant was given an MRI. Apparently, that MRI showed a spinal herniation, causing the doctor there to require the Grievant to take off from work.

On September 3, 1996, C.J. Garrison, M.D., who is associated with Baylorworx, a service of Baylor Health Care System, gave the Grievant a Release to Work, with no restrictions — full duty. However, on September 16, 1996, he was diagnosed with a herniated disk, and placed on medical leave again. On January 15, 1997, he underwent surgery for his herniated disk, and was then off on extended medical leave, while recuperating from this surgery.

Appendix

On December 17 and 18, 1997, personnel at Baylorworx performed a Functional Capacity Evaluation on the Grievant. The FCE concluded that the Grievant "demonstrated limited tolerance to work in lifting, carrying, the elevated position, crawling, kneeling, static crouching, and repetitive squatting." At the same time, it showed that the Grievant gave maximum effort in taking the test; that his performance was consistent; that he showed minimal physical pain; that he could safely handle the job at hand; that he has smooth, coordinated movements, but suffered muscle fatigue in lifting items from the floor, and that he could tolerate work in the forward, bent position whether sitting or standing; whether stair climbing, step ladder climbing, or in balance tasks.

On December 1, 1997, the Grievant's then physician, John A. Bousquet, III, M.D., wrote that, "I agree with present plan to evaluate for return to work and with impairment rating." He did not return to work until January of 1998, but the record indicates that might have been too early, under the circumstances. On March 13, 1998, Dr. Bousquet wrote to the Company, as a result of the Grievant's having missed two days of work in January. His letter states that, "[D]uring that time, Mr. Middleton was taking prescription medication for pain. Taking this medication can impair the performance of an individual and create an unsafe situation in the workplace."

On March 2, 1998, the Grievant had filed a request with the Workers Compensation Commission to change doctors. He stated, then, that he was "dissatisfied with care." At that time, he changed from an M.D. to the care of a Chiropractor, Charles R. Osborn, D.C., as his primary care physician.

Thereafter, the Grievant saw Dr. Osborn frequently, between March 23, 1998, and the date of the hearing, at which hearing, Dr. Osborn testified on behalf of the Grievant. Beginning on March 23, 1998, and continuing until June 30, 1999, Dr. Osborn treated the Grievant, and kept a running Patient's Progress Report for each of the said visits.

Reports of each visit show the Grievant to be complaining of low back pain, and still experiencing discomfort. On May 20, 1998, the Doctor wrote that, "[T]he patient will have some permanent disability as a result of this condition and . . . was given a list or restrictions to follow." The last entry in this Union Exhibit No. 5, is dated June 30, 1999. It states, in part, "[T]he diagnosis is unchanged. The patient has been advised of the likelihood of future exacerbations of this condition and the need for future treatment. PLAN: The patient should return as needed to control pain. this [sic] patient will have to be treated with relief care, which is authorized by law, until the recommended medically necessary treatment can be authorized."

The evidence, introduced at the hearing, indicated that one Dr. Richard Raughton, a Doctor of Osteopathy, was brought in to the Grievant's case. His function was to prescribe and administer injections of pain medicine to the Grievant, that a Chiropractor is not legally allowed to do. He administered a number of such injections of pain medicine. It was further shown that Dr. Raughton subleases office space from Dr. Osborn, the Chiropractor and the two Doctors refer a number of patients to one another in their practices.

Appendix

On February 1, 2000, Dr. Raughton wrote "To Whom It May Concern," that he sees the Grievant every 3 weeks to a month, "for these acute exacerbations of pain which are relieved with injections of various types." At that time, February 1, 2000, Dr. Raughton wrote that, "[I]t should be noted that Mr. Middleton suffers from status post lumbar laminectomy pain with acute exacerbations of such."

However, on March 27, 1998, Dr. Osborn wrote an "EMPLOYEE'S WORK LIMITATION SLIP" for the Grievant. In that Report, Dr. Osborn restricted the Grievant to no lifting over 25 lbs; "no excessive bending, no heavy pushing or pulling." At that time, Dr. Osborn wrote on the Report that the noted limitation would be permanent, and he then recommended a job change for the Grievant. Obviously, Dr. Osborn believed then that the Grievant no longer could be a Floorperson, striving to become an Operator in the Hot End of the Plant.

On May 8, 1998, the Human Resources Manager at the Company, wrote a Memo to the File. It appears that, when the Grievant learned from Dr. Osborn that his injury would cause him to be permanently restrictions [sic] in the work he would be able to perform, he applied to the Company for Permanent Total Disability (PTD). The Memo to the File indicates that, "Steve Middleton is not eligible to apply for PTD. As mentioned in the contract, an employee must have ten (10) years of service before he is eligible to apply for PTD. Steve Middleton was hired on 12/5/88 and will not have ten years until 12/5/98."

Then, on the same date of May 8, 1998, Dr. Osborn prepared another EMPLOYEE'S WORK LIMITATION SLIP for the Grievant. On this Slip, Dr. Osborn again reiterated the same work restrictions he had shown on his March 27 Report. However, on this May 8 Report, he now shows the Limitations to be temporary, for a period of 8 weeks, instead of permanent, as shown on the March Report. Moreover, no longer does Dr. Osborn recommend a job change; that section of the Report is now ignored.

On June 25, 1998, Dr. Osborn prepared still another EMPLOYEE'S WORK LIMITATION SLIP for the Grievant. This Report is almost identical as the previous such Report. However, the period of temporary limitation has been [sic] changed from 8 weeks to 6 weeks from the June 25 date.

A month later, however, on July 27, 1998, Dr. Osborn prepared another Work Limitation Report for the Grievant. This time, with the same limitations as shown before, the time period for the temporary limitation was increased to 8 weeks from the July 27 date. However, the Patient Progress Report for the Grievant, kept by Dr. Osborn, shows a different result. On a July 22, 1998 visit, Dr. Osborn reported that the patient had reported decreased pain since the previous visit, and that "there has been great relief since last treatment; the last treatment helped considerably." The temporary limitation period was increased from 6 weeks during the June visit to 8 weeks during the July 27 visit, without any explanation of why the apparent discrepancy.

Article 33 of the CBA governing the Grievant's employment at the time of his injury, provides that an

employee disabled by an occupational injury, and who cannot work his regular job, "will be placed on any job acceptable to him which he is qualified to perform in line with his seniority (and qualifications). . . ." This is the provision that the Grievant alleges the Company has violated in not returning him to work when he received a Release To Work, with restrictions.

On August 10, 1998, the Company wrote to Dr. Osborn to the effect that the Company understands that the Grievant "still has certain restrictions that prohibit him from returning to his regular job as floorperson. We would like to ascertain whether he would be able to safely perform a different job in our plant with his current limitations." With that letter was enclosed a list of job descriptions that might be available for the Grievant, and the question to Dr. Osborn was to point out to the Company which of those jobs, if any, the Grievant could perform "with his current restrictions."

On August 20, 1998, Dr. Osborn responded that 6 of the listed jobs were all right for the Grievant to handle, and said nothing concerning the previously noted restrictions for any work. All of the jobs listed are in the Cold End of the Plant, and do not include the Floorperson or Operator jobs, both of which are in the Hot End. At that time, the evidence indicated that the Grievant did not have sufficient seniority to warrant any of the Cold End Jobs.

On September 3, 1998, the Company again contacted Dr. Osborn. It wanted Dr. Osborn to inform the Company how much weight the Grievant could lift and how often; what was his range of motion in safely lifting, bending, reaching,

squatting, etc.; and what limitations he has in standing, walking, static sitting, climbing stairs, etc. The Company informed the Doctor of its position "in not wanting to cause further injury to Steve Middleton, and this information will be vital in making our decision how to address this situation." In addition, the Company notified Dr. Osborn that it wanted a second opinion from its own doctor.

The letter requested that Dr. Osborn prescribe an FCE for the Grievant, to be done at Baylorworx in Waxahachie. About the middle of September, the Grievant called the HR Manager at the Company, and told her that he did not want Baylorworx to perform the FCE on him. Rather, he wanted Sargent Injury Rehabiliation [sic] to do the FCE. He had no confidence in Baylorworx since Dr. Garrison [sic], from there had released to him to work so long ago, with no restrictions of any kind.

However, neither the Company nor the Grievant then knew of the contractual employer-employee relationship of Dr. Osborn and Sargent's. The Company agreed that Sargent Injury Rehabilitation should do the FCE on the Grievant. It did, and subsequently sent the FCE Report, dated September 29, 1998, to the HR Manager at the Company.

On October 16, 1998, the Grievant filed his Grievance against the Company, that is the subject of this proceeding. In his Grievance, the Grievant alleged the violation by the Company of Article 33 "& any available Articles," of the CBA. The Grievance alleges that, "Steve has not been allowed to work after being evaluated and released." It asks that the Grievant "be made whole for all hours missed since

date of evaluation & be called to work in line with his seniority." It then shows the Union's Position: "After obtaining a Doctor's Release and taking the F.C.E. Steve is entitled to work certain jobs in line with his seniority."

On December 15, 1998, the HR Manager of the Company wrote to the Union, as the Company's Answer at Step 2 of the Grievance Procedure. The Company's Answer states: "Steve Middleton's work-related injury to his back resulted in permanent restrictions, and he is unable to perform his regular hot end job. It is the company's position that we do not offer light duty for employees with permanent restrictions." The Answer then indicates that the Company had an FCE performed on the Grievant to see if he could work any Cold End jobs. "The test results did not convince us that Steve could safely perform the jobs without restrictions." The Company requested clarification of the test results from the Grievant's doctor, but such information was not forthcoming from the said doctor. The Company concludes its Answer by notifying the Union that it "could not allow Steve to take a job in the cold end, as we did not want to risk having him re-injured." The Company again denied the Grievance.

On December 30, 1998, the Company responded to the Union, as its 3d Step Answer to the Grievance. This Answer notifies the Union that the Company is providing the Grievant's doctor with additional information so the doctor can assist the Company in determining which, if any, jobs in the Plant the Grievant could then qualify for and perform. The Grievant's doctor had agreed to visit the Plant in January,

observe the jobs being performed, and then agreed to reevaluate the jobs for the Grievant's return.

On January 13, 1999, the Union wrote to the Company, indicated that Dr. Osborn had visited the Plant to see what classifications the Grievant might be able to perform. "I am hopeful and confident that, when Dr. Osborn makes his report, we will know the classifications that the grievant can safely perform and he will be returned to work shortly, if his seniority entitles him to do so." Both parties were working to settle this matter to everyone's satisfaction.

Apparently, the parties continued to process the Grievant's Grievance, and continued to work to return him to a job at the Plant. On June 17, 1999, the Company wrote to the Union, in what it captions as a "Reply to 3rd Step Grievance." The Answer notes that the Grievant continues to request a return to his former position as a Floorperson. The Company noted that it is its policy to return an employee to work after an injury "as long as the employee can safely perform all essential functions of the job."

The Company then notes contradictions between the Grievant's FCE, and Dr. Osborn's release for him to perform several Cold End jobs. However, the Company pointed out to the Union that certain restrictions contained in the FCE "would make performing the job impossible or unsafe." The letter recites the fact that the doctor informed the Company that the Grievant could perform certain Cold End Jobs with no restrictions. However, the doctor did list certain restrictions that would apply of [sic] the Grievant were returned to the Floorperson job. The letter reiterates to the

Union that the Grievant did not, then, have sufficient seniority to be awarded any of the jobs in the Cold End. Moreover, since he could not perform his old job, without help from some other workers on the floor, the Company could not safely return him to that Floorperson job. The letter concludes that the Company refused to put the Grievant at risk of further injury by returning him to his former job, in which he cannot safely perform the essential functions. "We have taken all steps possible to investigate the possibility of returning Steve to his former job. Unfortunately, the results are not in his favor."

On June 24, 1999, the Company again wrote to the Union, and sent it chronological data on the career of the Grievant, including hire date, injury date, doctors care, release to return to work on several occasions, some with no restrictions, some with restrictions.

On September 14, 1999, the resolution of this Grievance still was being negotiated. The Company then wrote to the Union, reiterating its former position. He no longer was qualified to work as a Floorperson, and until July of 1999, his seniority did not permit him to work in the Cold End of the Plant. The Grievant had been contacted by the Company with a return to work letter. He was asked to contact the Company to arrange for his return to work at the Cold End. He failed to contact the HR Manager after his receipt of that letter.

Despite that fact, the Company agreed with the Union that, if the Grievant would report to Baylorworx for a "work step survey (as all recalled employees are required to do)

with a copy of his latest functional capacity test for Baylor Worx's review, we could begin the process for his return to work at the Waxahachie facility."

On September 16, 1999, the Area Director of the International wrote to the Company and stated that "there is nothing that changes my mind." At that point, arbitration was being considered. It then was processed to arbitration, where both parties agree it is properly before the arbitrator for a final decision.

On November 5, 1998, the Company wrote to Dr. Osborn, after Sargent Injury Rehabilitation had completed the FCE, and sent it to the Company. The Company notified Dr. Osborn that it had tried, unsuccessfully, to reach Ms. Stephanie Sargent, who was the Operator who had given the Grievant his test for the FCE. The letter notified the Doctor that it was trying to obtain accurate information "so that we can make an informed decision regarding Steve Middleton's ability to safely perform a job in our plant." The Company wrote to the Doctor that it had noted certain contradictions between "Steve's restrictions and the physical demands of the above jobs."

The Company wanted clarification of the Sample's [sic] FCE results "before we proceed any further with this issue." The Company subsequently learned that it was Dr. Osborn who told Stephanie Sargent what to put in the FCE, and who actually signed the Report itself. Also, it was determined at the hearing that Sargent's pays Dr. Osborn $2,000.00 per month for reading and interpreting the FCEs. Moreover, Dr. Osborn refers his patients to Sargent's for the performance

of the FCE work, and then he signs the FCEs as though he was the one responsible for the manner in which it was handled. Patients are not given any information concerning the business relationship between the two said entities. Nor was it the "second" opinion the Company had requested. This FCE appeared to do no more than mirror the conclusions and recommendations earlier made by Dr. Osborn to the Company.

However, the Company points out that the Tables in the FCE contradict the conclusions shown in the FCE Summary. The Tables, according to the Company, show a restriction on the Grievant to almost all the jobs listed as being available for the Grievant to handle. Moreover, the FCE uses terms such as "repetitive," without defining the term. And, according to the Company, it makes no distinction between Cold End and Hot End jobs.

The HR Manager tried to reach Stephanie Sargent, to discuss these apparent discrepancies with her, to no avail. So she contacted Dr. Osborn, to seek clarification from him. She received no clarification from Dr. Osborn. Thereafter, the HR Manager requested Dr. Osborn to visit the Plant, and determine, on site, which jobs the Grievant could handle, with his current restrictions. Dr. Osborn did visit the Plant, and examined the available jobs, and talked with the then-working Machine Operator. His visit lasted about 30 minutes, and he then wrote to the Company about the results of his visit.

Dr. Osborn informed the Company that the Grievant could again perform his job as Floorperson in the Hot End,

"if he does not have to change out the cores or the molds himself." The Grievant usually reported his job as that of Floorperson. However, on at least one occasion he reported his job to be that of Apprentice Operator. In either such job, the incumbent must change out the molds. He cannot have someone else working at the Plant do that for him. That function is one of the things called an "essential function of the job," by the Company. The incumbent must be able to perform all essential functions in order to hold the said job. The Grievant wanted the Company to provide someone to change the molds for him, as a reasonable accommodation, under the Americans With Disabilities Act. The Company declined.

There was no job at the Plant, in either the Hot End or the Cold End, that the Grievant could handle, with restrictions. He requested light duty work, until his restrictions were removed and he could perform the duties of his regular job without assistance from anyone else. He was told the Company has no light duty work, on a permanent basis, and his restrictions were designated as permanent, or as temporary, for 6 to 8 weeks. The Company has created light duty jobs for injured employees, but only up to a maximum of 2 weeks. The Union disagreed, and tried to show examples of other and longer light duty work for certain employees.

On March 8, 1999, the HR Manager wrote to the Grievant, and told him that the Company had had Baylorworx prepare a job site assessment, or formal job analysis, for it. She then wrote to the Grievant that the Company wanted to match his then-current abilities with the essential functions

of a job he could handle. She then enclosed a Release of Medical Information for the Grievant to sign and return to her. With that Release, she could send a copy of the Grievant's FCE to Baylorworx for Cathleen Moore, the Senior Occupational Therapist at Baylorworx, to evaluate. Then, she could compare it with her Job Site Analysis, and determine which, if any, of the available jobs the Grievant might be able to handle, with his restrictions.

The Grievant had filed suit against the Company, in Federal Court in Dallas, and had retained personal counsel to represent him in that suit. Neither the Union, nor the Union's counsel, was involved in the Grievant's said suit against the Company. The Grievant told the HR Manager that he could not sign the Release of his FCE to anyone, until he had talked with his attorney, and determined what he wanted him to do about it.

That attorney castigated the Company for going around him, directly to the Grievant, and refused to allow the Grievant to give his permission for the Company to show his FCE to any third party. The Company's counsel responded to the said attorney that the Company has the right to contact its own employees, without having to go through any attorney he might have. This is especially true, according to the Company's attorney, when the Company is attempting to return the employee to full-time employment.

Therefore, the Grievant refused to sign a Release so the Company could refer a copy of his FCE to Baylorworx for its examination and utilization in returning the Grievant to

work. The Company argued that, without this information, it could not determine whether the Grievant could be returned to work or, if so, for what job or jobs.

The Company attorney wrote to the Grievant's personal attorney, and explained to him why a second opinion was necessary for the Company. The Company alleged contradictions between the FCE and correspondence from Dr. Osborn, concerning the Grievant's ability to handle the work of Floorperson. That was the job that the Grievant had held, on a full-time, regular basis. That was the job (he termed it apprentice operator) that the Grievant wanted to return to work. In fact, at one time, Dr. Osborn had written to the Company that the Grievant never would be able to handle that particular job again, and requested a job change for him.

Before mid-July, 1999, according to the Company, the Grievant did not have sufficient seniority to qualify for any of the Cold End jobs. However, the Company contends that, even if he did have the seniority, the Company could not return him to such a job, since the Grievant never would sign the Release it requested.

The Company contends that it needed to send a copy of that FCE Report to Baylorworx, to match the Grievant's physical abilities with a Cold End Position for which he could qualify. The Grievant was notified that he was then eligible for one of the jobs in the Cold End. However, until it could match his restrictions, and the essential functions of the various jobs available, the Company could not safely place the Grievant in any one of the available jobs for fear of having him re-injure himself, or aggravate his existing injury.

Appendix

The Grievant's personal attorney responded by notifying the Company it had violated the Cannon of Ethics by going around him directly to his client. The Company attorney responded to the said attorney, and denied such a violation of the Cannons at all. Despite such a refusal by the Grievant's attorney, the Company continued to attempt to secure a Release from the Grievant for a copy of his FCE to be sent to Baylorworx.

On October 9, 1999, the Company wrote to the Grievant's attorney, and requested that he ask Dr. Osborn to confirm that the Grievant's physical condition had not changed since his FCE, and that the Grievant be allowed to sign a Release for the FCE to be sent to Baylorworx. That attorney never responded to the Company's said letter.

The evidence brought forward at the hearing seemed to acknowledge that the Grievant knew that he could not be returned to work until the Company doctor could examine him, or until he allowed a copy of his FCE to be sent to Baylorworx for evaluation. He did not so permit, and it appears he was not permitted by his attorney to sign a Release for his FCE or allow the Grievant to be examined by the Company.

Moreover, the evidence indicates that the Grievant's medical doctors (not Dr. Osborn, the Chiropractor) were giving the Grievant injections of certain drugs, and giving him prescriptions for drugs to give him temporary relief from the pain he was suffering, and, hopefully, to assist in curing the problem so the Grievant could return to work.

However, the evidence showed that certain side effects of the drugs the Grievant was taking, caused him to be drowsy and inattentive and, in fact, it was shown, could make it unsafe for the Grievant to work in, around or with machines or machinery. Moreover, when the Grievant was removed from one such drug (Soma), he suffered withdrawal symptoms that appeared to be dangerous in and of themselves.

Although the Company was unable to secure permission to show the Grievant's later FCE, made by Sargent's, the Company employed Ms. Cathleen Moore, the Senior Occupational Therapist from Baylorworx, to make a site assessment of the jobs at the Plant. This was for the purpose of determining which, if any, of the jobs (especially the Cold End jobs) the Grievant might be able to handle, with the restrictions placed on him by his health providers.

Ms. Moore found that changing the molds in the bottle-making machines (a Hot End job) is an essential function of the job of Operator or Floorperson. Moreover, she found that, due to the restrictions placed upon the Grievant, by Dr. Osborn, it would be difficult for him to handle most of the jobs in the Cold End. However, she did suggest that the Grievant take a 4-day muscle-strengthening program — at her Baylorworx — before returning to any job with the Company.

The Grievant did, in fact, begin such a strengthening program. However, for some reason not shown at the hearing, the Grievant discontinued his muscle-strengthening program before the end of the time scheduled for him to attend.

The reason could not have been because he was then called back to work by the Company, as the Company was waiting for him to finish such a program, and securing additional information from Dr. Osborn, before calling him back to any job.

The evidence indicated that the Grievant could not return to his Hot End job, unless the Company could furnish someone to change the molds for him, each time they needed to be changed to change the bottle size produced by the machine. This is an essential function of the job, and has to be performed by the incumbent of that position. The Grievant felt that the Company should make a reasonable accommodation for him by having an Upkeep employee, or another Floorperson, change the molds for him each time they required changing. The Company refused to do so, on the basis that the ADA does not require the Company to do that, as a reasonable accommodation.

At the hearing, it was learned that, at the time of the Grievant's back injury, the Company had 4 Floorpersons working in the Hot End, on each of the 4 Shifts each day. However, at the time of the arbitration hearing, the Company witness testified that the Company had cut back to only one Floorperson, and that was on the Day Shift, Monday through Friday. Thus, there would no longer be anyone available who could even do the Grievant's job of changing the molds.

Appendix

FINDINGS AND OPINION OF THE ARBITRATOR

The Union has alleged, in its Grievance, that the Company has violated Article 33 of the CBA, by not returning the Grievant to work when his doctor released him to return to his former job. Article 33 is styled, "Disabled Employees." Sec. 1. refers to those "disabled by reason of physical disabilities or infirmities." Sec. 2. refers to those "disabled by reason of occupational injury or illness and who is unable to work his regular job will be placed on any job acceptable to him which he is qualified to perform in line with his seniority (and qualifications). . . ."

Thus, it would appear that Sec. 1. was meant to cover those employees who are disabled under the definition of the ADA, and not to those who are injured while on the job. Sec. 2. then, is limited to those employees who are disabled as a result of their particular job with the Company. In my opinion, the two are mutually exclusive, and do not build upon each other.

I believe we are concerned, in this hearing, only with Sec. 2. of Article 33 (and Sec. 3. that provides for the Contract to be administered under the provisions of the ADA). The Grievant obviously is covered by Sec. 2 of this Article, since there is no dispute over the fact that he was injured while cleaning a bottle-forming machine in the Hot End of the Plant.

Sec. 2. is clear and unambiguous in providing that any employee injured on the job, "will be placed on any job acceptable to him which he is qualified to perform in line

with his seniority (and qualifications). . . ." The Union, in its well-reasoned Brief, argues that the Company is attempting to add conditions to the contractual right guaranteed the disabled employee. The Union argues that the Company "will" (must) return the Grievant to a job that is acceptable to him, and for which he is qualified to perform, if he has the seniority for that position.

The Grievant was a Floorperson (he says that is the same as an Apprentice Operator, since he has been learning to operate the bottle-making machines, and had completed from 2500 to 3000 of the necessary 4000 hours to become a journeyman Operator), when injured on the job. He has asked that he be returned to his former position (Floorperson/ Apprentice Operator), as that job is acceptable to him; he is qualified to perform it; and he has the seniority to handle that job, since he already was doing so before being injured.

The Union argues that there is no contractual requirement that the Grievant must satisfy "the individual whims of the Company's Human Resource Manager; or that the Grievant furnish the Company with an FCE or signed Releases; or that he submit to an additional physical examination. The contractual right belongs to the employee (acceptable to the employee). [sic]

The Union contends that the Grievant has repeatedly attempted to exercise his contractual right to be returned to his former job, but the Company has adamantly refused. The Company has no right to require additional prerequisites, before allowing the Grievant to return to his former position,

for that is not what the Contract provides. The Company should negotiate for changes in the Contract, and not try to change it in arbitration.

I would agree completely with the Union in this regard, if it were not for one thing. It is now undisputed that the Grievant need not be returned to his former job, by the Company, unless he has the same qualifications as before to handle that position now. The Grievant does not. In fact, his own treating health provider (Dr. Osborn) is the one who first placed the Grievant on permanent disability, and requested a job change for the Grievant, as he never again would be able to perform the job of Floorperson, or of Operator on the Company's bottle-making machines.

While it is true that, after the Company showed the Grievant that he was disqualified for the status of permanent disability with the Company, as he requested since he did not have sufficient seniority with the Company, Dr. Osborn changed his diagnosis of the Grievant. Thereafter, the doctor dropped the request for a job change from his Status Reports; made his diagnosis one of temporary disability; and variously noted different periods of temporary disability as 6 weeks; then 8 weeks; then 6 weeks again. Moreover, the doctor never removed the restrictions he placed on the Grievant originally, as to the amount of weight he could lift (or needing help to change the molds in the bottle-making machines); or of the restrictions on the Grievant of pushing, pulling, bending, stretching, reaching, etc.

In short, the Grievant was not the same person after his second injury, in 1996, and his back surgery in 1997, from

which he had not yet fully recovered at the time of the arbitration hearing. He still was seeing his Chiropractor for treatments, and his physician for pain shots, on a weekly, bi-weekly, or monthly schedule. He still was suffering with pain; he still was being medicated; and he still had work restrictions that disqualified him from any Hot End job, without help from co-workers who no longer are there to help him, even if they could have done so.

The Contract may provide that the Grievant be given any job that is acceptable to him, but it does not provide that he is his own doctor when it addresses jobs for which he is qualified to handle. The doctors who treat the Grievant determine whether he is physically qualified to do the required work; and the Company determines whether he has the skills required to so handle the said job (qualifications). The evidence clearly indicates that the Grievant no longer is physically qualified to perform all the essential functions of the Floorperson or Operator job in the Hot End of the Plant.

The Contract does not require that the Company provide the Grievant with an assistant, or helper, to perform the various essential functions of the job he no longer is able to perform himself. I find that the Grievant no longer is able or qualified to perform the job of Floorperson or Apprentice Operator, previously held by him.

The Union correctly admonishes me to follow the precise language of the Contract. That I must, and will, do. The Union argues that, "[T]he contract speaks for itself." That is true, and this Contract states that the Grievant will be placed on an acceptable job "which he is qualified to perform."

The language is clear. The Grievant, unfortunately, no longer is qualified to perform all the essential functions of the job of Floorperson/Apprentice Operator, with the restrictions placed on him by his health providers.

The Union correctly concludes that, "[I]f the language of the Collective Bargaining Agreement is clear and unequivocal, as it is in this case, the arbitrator should not give it a meaning other than that expressed." I agree, and I will not do so. The Union argues that, if I find the language of the Contract to be unambiguous, I should enforce the clear meaning of that language, even if the parties themselves disagree as to its meaning. Again, I completely agree. In fact, I believe I have done so in this case as shown by my Opinion here expressed.

The Union contends that I must rule only on my interpretation of the language of the CBA that gave rise to the issue before me. I have no authority to alter, modify, add to or subtract from any of the terms or provisions of the Agreement. I agree completely. Unfortunately, it may be that my interpretation of the meaning and intent of the provisions of Sec. 2. of Article 33 are not as the Union would like for me to find. For that, I am sorry. However, as the Union has shown, I can but interpret the words there negotiated by and between the parties; I cannot change them.

In my opinion, even if those weight, and other, restrictions, all were removed in one fell swoop, by his health providers, the Company still would have the right to require all the same tests it requires of any employee returning to work after having been off. Moreover, in the Grievant's case,

the Company is right in requiring a second opinion, from a more objective source, as to whether the Grievant can safely perform the duties of any job to which the Company might return him. After two back injuries, and a back operation, certain jobs may be more dangerous than other jobs, for the Grievant, and could aggravate the existing infirmity, or permit a reoccurrence. The Company should not be placed in the position of being the cause of a third back injury to the Grievant, while in its employ.

Moreover, Article 30 of the CBA is entitled "Weight Lifting." It provides that no employee shall be required to perform any job duties, when, in the opinion of the Union and Management, that job requires excessive "weight lifting." Certainly, if the Company cannot require any employee to perform any job that entails excessive weight lifting (the Floorperson and Operator's jobs), it can elect not to allow such employee to perform such work, if it believes that doing so might cause injury, or re-injury to that employee.

Until June of 1999, the Grievant did not have sufficient seniority to qualify for a position in the Cold End. After that date, his seniority allowed him to be placed in one of the jobs in the Cold End of the Plant. It is to his credit that the Grievant has fought long and hard to be able to return to work in some job that he could perform, and for which he had the seniority to be chosen.

However, the transcript of the tape recordings made by the Grievant of his conversations with the HR Manager of the Company, convinced me that the Company also was anxious to return the Grievant to some job with the Company.

However, those conversations convinced me that the Company was more concerned with the Grievant's safety, and the need to protect him from further injury, than it was in just satisfying his desire to be working again after such a long absence.

When the Grievant's personal attorney refused to allow the Grievant's FCE to be studied by the Therapist at Baylorworx, or to allow him to be examined by the Company doctor, that attorney — and not the Company — has kept the Grievant from returning to work at some job in the Plant for which he is qualified, and for which his seniority will permit. Article 4 of the CBA (Management Rights) gives the Company the right to establish "standards of production and performance by the employees on all machines and operations." This provision would give the Company the right to a second opinion, or to have the Grievant examined by its own physician, before allowing the Grievant to return to work, with restrictions on his ability to perform the job to which he is being returned.

The Union contends that the Company is arguing "that it is entitled to unwritten procedures that should relate to the application of Article 33." I disagree. I find that the Company has followed the mandates of the CBA by attempting to determine from a medical source better informed than Dr. Osborn whether the Grievant is capable of performing any particular job in the Plant, be it in either the Hot End or the Cold End, for which he has the seniority.

The Union and its counsel both have performed yeoman service in their attempts to get the Grievant back to work.

It is my opinion and finding that, had it not been for the obstructive and uncooperative position taken by the Grievant's personal attorney, the Grievant would have been returned to work long before this time, at some position in the Plant for which his qualifications and seniority would permit him to fill, taking into consideration his actual physical limitations and restrictions.

The Union argues that, simply because Dr. Osborn showed the Grievant's injury to have caused a permanent disability, and his inability to work his regular job again, permanent really does not mean forever. One's physical condition can change, and one no longer be permanently disabled. I wonder why Dr. Osborn did not tell that to the Grievant, instead of assisting him with his Application for Permanent Disability with the Company? Dr. Osborn certainly must have led the Grievant to believe that his injury had caused him to suffer a permanent disability. Why else would he have made application to the Company for such a status, with its consequent rewards?

The Union argues that, even the Company recalls employees to work after it has placed them on permanent layoff. That is true, of course, because it is covered in that manner in the Contract negotiated by the parties. Article 8 covers Seniority. Sec. 10. thereof covers "Permanent Layoffs," as follows: "During periods of reduced activity, making a reduction in the work forces necessary, the least senior employee will be laid off. Recall will be in reverse order." That is the Section to which the Union attorney referred in questioning the HR Manager about "permanent" layoffs. And that is the language negotiated by both parties to this arbitration hearing.

Appendix

The Union argues that, even with the permanent restrictions, the Grievant still was able to handle certain jobs at the Plant, in the Cold End. Therefore, Dr. Osborn must have meant that the Grievant was permanently disabled and unable to handle the job of Floorperson/Assistant Operator any longer. That must be why he fast wrote that the Company should change the Grievant's regular job, and give him a different one. However, that also changed, and Dr. Osborn led the Grievant to believe he could handle his former job — if someone else changed out the molds for him. To me, that is an admission that the Grievant could not handle the said job, in all its essential functions, alone. Rather, he needed help from co-workers in order to be able to hold the job that he faults the Company for not giving him.

The Union argues that the Company allowed other employees to work on light duty, but did not allow the Grievant to work even one day of light-duty work. The Company's response to this argument was that it did not allow any employee to have light duty work, if such work was to last more than 2 weeks. However, if an employee had been hurt, and was scheduled to return to his regular job within 2 weeks, the Company agrees that sit [sic] gave such employees certain light-duty jobs to fill while they were recuperating. The Company contends tha[illegible]ll employees on light duty were given some kind of work t[illegible] do: they did not sit in the break room and sleep or watch television.

The Union introduced into evidence a letter from an International Representative of the Union sent to the Company. That letter shows the Union's interpretation of what happened after the Grievance was filed on October 16,

1998. It accuses the Company of doing everything in its power to delay putting the Grievant back to work. I have found this not to be the case. In fact, I have found that the Company tried to find a way to safely return the Grievant to work, while satisfying itself that he would not re-injure himself when allowed to work at certain jobs. It was the Grievant's personal attorney who did "everything within its power to delay both the processing of this grievance and Mr. Middleton's return to work."

The letter states that the Grievant "should have been returned to the job of Floorperson in accordance with the report of Dr. Osborn." It was Dr. Osborn who fast reported to the Company that the Grievant was permanently disabled, and never again could fill the position of Floorperson. It was he who asked that the Grievant's job be changed from Floorperson. When he later changed his mind, and wrote that the Grievant could perform the Floorperson's job, he placed so many resrtrictions [sic] on that return to work that the Company could not meet all of them, and was not required to do so, under the terms of the ADA.

The Company was not required to provide an assistant to the Grievant, to do the work of changing the molds in the machines. That is an essential function of the job. If the incumbent is not able to handle all the essential functions of a job, by himself, he is not able to hold the job. The ADA does not require the Company to reasonably accommodate the injured employee, by giving him an assistant, or someone to do the part of the job he cannot do himself, or to perform any essential function of the job for him. Neither the Contract nor the ADA requires the Company to do that so the Grievant can hold the said job.

Appendix

The Union, in its Brief, argued that the Company introduced great quantities of irrelevant evidence, in an attempt to "misdirect" me in deciding the real issue involved. The Issue, as the Union reminds me is whether or not the Company violated the Contract by not returning the Grievant to work. My answer to that question has been, and is, that it was the Grievant's personal attorney who is responsible for requiring the Grievant to violate the Contract by not agreeing to permit the Company to seek the medical evidence needed in order to protect both the Grievant and the Company when the Grievant is recalled to some certain job at the Plant.

If the Grievant desires to seek his representation from his personal attorney, rather than from his Union, then it is the Grievant himself who must suffer the consequences. The Union did not choose the health providers for the Grievant. It was not the Union that deceived the Grievant into believing that his Chiropractor, his Doctor of Osteopathy, and his Sargent Injury Rehabilitation, all were separate, individual and distinct health providers, all seeking to benefit the Grievant and not themselves, jointly and severally.

The connection between and among all the Grievant's health providers, and the fact that the Grievant never was told by Dr. Osborn of the close business relationship among all the said health providers, leads me to the conclusion that the Grievant's leading medical witness is something less than credible as an expert witness. No matter how hard the Union attempts to fight for the Grievant, it cannot undo the damage done to the Grievant by himself in his choice of health providers and personal attorney, insofar as it affects this particular case.

Appendix

The Union argues that, "[T]he record before this Arbitrator does not establish any inability caused by medication on the part of Middleton as relates to performing the duties associated with various jobs in the plant." I disagree. The record before me indicates that the Grievant continually was given injections for pain, which injections may or may not have caused an impairment for certain kinds of work — unless the effect of the pain medicine wore off while the Grievant was performing his regular work assignments. However, the prescription drugs that were prescribed for the Grievant, including but not limited to Soma, together with the list of possible side effects of those drugs as introduced into evidence, leads me to believe that it was more than just possible that it was dangerous for the Grievant to be allowed to perform the duties of Floorperson while taking the said prescription drugs. He admitted, himself, that he never was made aware of the side effects of the medicine he was taking.

The Union argues that it is irrelevant that the Company preferred to have its own doctor make a determination as to whether or not it was safe to allow the Grievant to return to work, and be placed on a job that could endanger his safety, and the safety of those who worked around him. It is more relevant, according to the Union, that the Texas Workers Compensation Commission approved Dr. Osborn for the Grievant's treating health provider, and that the said Commission did not require the Grievant "to submit to such an examination or evalutaion [sic]."

The Company is bound by the Contract of the parties, and by the ADA and the laws of the United States and of

Texas. The Workers Compensation Commission is not a party to the Contract between the parties, nor does it control the actions of the Company under the terms of its said Contract. The actions of the Workers Compensation Commission do not establish any criteria for the Company to follow, or that would assist me in any way, in my making the decision I must make in this matter. It is an entirely different entity, separate and apart from requiring anything that must be interpreted by me in deciding whether the Company violated a negotiated Agreement.

The Union argues that the Grievant did not have to follow the "mythical obligation," as required by the Company, since such requirements are not contained in the CBA. The Union contends that, "[T]he Grievant has done everything required of him by the contract and by the Texas Workers' Compensation Commission. Steve Middleton is entitled to return to work immediately." I cnnot [sic] agree that the Grievant has done everything required of him by the Contract; I pass no judgment on whether he has done everything required of him by the Texas Workers' Compensation Commission, since such an issue is not before me; and I agree that he should be entitled to return to work immediately. Again, the only reason that he may not be working already is the fact that the Grievant's own personal atrtorney [sic] will not allow the Grievant to be examined, or have his medical records examined by an objective medical source, or a second opinion. To date, all it has is the opinion of Dr. Osborn, and that includes certain contradictory information that said doctor either cannot, or will not, elucidate.

Appendix

AWARD OF THE ARBITRATOR

The Issue: DID THE COMPANY VIOLATE THE COLLECTIVE BARGAINING AGREEMENT BETWEEN THE PARTIES BY REFUSING TO RETURN THE GRIEVANT TO EMPLOYMENT, AS AND WHEN IT DID, FOLLOWING HIS INJURY AT WORK? IF SO, WHAT SHALL BE THE APPROPRIATE REMEDY THEREFOR? is answered in the negative.

The Company did not so violate Article 33, or any other Article, of the Collective Bargaining Agreement between the parties. Therefore, the Grievance is Denied.

Barnett Goodstein
Arbitrator

4230 LBJ Freeway, Ste. 215-J
Dallas, TX 75244

July 11, 2000